MOTION FILED
JUL 30 1982

No. 81-1623

# In the Supreme Court of the United States

OCTOBER TERM, 1982

**JOHN ASHCROFT**, Attorney General of the State of Missouri, and **RALPH L. MARTIN**, Prosecuting Attorney of Jackson County, Missouri,

*Petitioners,*

v.

**PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,**

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan—Suite 915
Chicago, IL 60601
312/263-5029

*Attorneys for Americans United for Life*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

# In the Supreme Court of the United States

OCTOBER TERM, 1982

## No. 81-1623

**JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,**

*Petitioners,*

v.

**PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,**

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## MOTION OF AMERICANS UNITED FOR LIFE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Americans United for Life hereby respectfully moves for leave to file the attached brief amicus curiae in support of petitioners in this case. Written consent of the petitioners has been obtained and filed with the Clerk of this Court. The consent of the attorney for respondents was requested but refused.

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every state of the union.

This case, like others presently to be considered by this Court, involves consideration of several broad areas of abortion regulation, including the health regulation of first trimester abortions (specifically through the requirement of pathology reports), the health regulation of post-first trimester abortions (specifically through the hospitalization requirement), and the protection of live-born children in post-viability abortions (specifically through the requirement that a second physician attend the procedure). This Court's decision will have a profound effect nationally on the validity of abortion regulations, and thus is of central importance to the class of unborn children, as well as the class of children aborted alive, all of whose interests AUL seeks to promote.

The arguments offered by AUL are independent of those suggested in petitioners' cross-petition for a writ of certiorari, and if accepted by this Court, would be dispositive of this case.

Respectfully submitted,

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan—Suite 915
Chicago, IL 60601
312/263-5029

*Attorneys for Americans United for Life*

## TABLE OF CONTENTS


PAGE

Table of Authorities ..... iii

Interest of the Amicus ..... 1

Summary of Argument ..... 2

Argument ..... 5

I. Strict Scrutiny Is Not The Appropriate Standard Of Review For The Challenged Provisions ..... 5

A. Strict Scrutiny Is Only Appropriate When Legislation Substantially Burdens the Woman's Freedom to Decide ..... 5

B. Strict Scrutiny May Not Be Invoked Merely Because Abortion Is Treated Differently Than Other Medical Procedures ..... 7

C. The Regulations at Issue Do Not Substantially Burden the Woman's Freedom to Decide: They Rationally Relate to Legitimate State Interests ..... 9

II. Even Under Strict Scrutiny Analysis, The Provisions Are Constitutional ..... 13

A. The State's Compelling Interest in the Life of Infant Persons Justifies the Second Physician Requirement ..... 14

1. The State Has a Compelling Interest in Actual Human Life ..... 14

PAGE

2. The Second Physician Requirement Is Narrowly Drawn ..... 15

3. The Requirement of a Second Physician Is Not Overbroad: An Abandoned D & E Procedure Might Produce a Live Birth ..... 16

B. The State's Compelling Interest in Maternal Health Justifies the Pathology Report and Hospitalization Requirements ..... 19

III. Conclusion ..... 27

Appendix ..... App. 1

# TABLE OF AUTHORITIES

*Cases*

PAGE

Bellotti v. Baird, 428 U.S. 132 (1976) ..... 8

Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II) .... 6, 8, 10, 22

Carey v. Population Services International, 431 U.S. 678 (1977) ..... 5-6

Connecticut v. Menillo, 423 U.S. 9 (1975) ....3, 6, 9, 11, 19-21

Dandridge v. Williams, 397 U.S. 471 (1970) ..... 9

Doe v. Bolton, 410 U.S. 179 (1973) ..... 20

Harris v. McRae, 448 U.S. 297 (1980) .....2, 8, 11, 14, 19

Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976) ..... 7

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) ..... 9

Maher v. Roe, 432 U.S. 464 (1977) .....5, 7-8, 10

McGowan v. Maryland, 366 U.S. 420 (1961) ..... 8

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, No. 79-4142-CV-C-H (W.D. Mo. Oct. 2, 1981) ..... 24

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) ..7,9, 12, 24

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) .....*passim*

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Whalen v. Roe, 429 U.S. 589 (1977) ..... 6

Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) ..... 7

*Other Authorities*

PAGE

Benson, R., Handbook of Obstetrics and Gynecology (7th ed. 1980) ..... App. 4

Burnhill, Reducing the Morbidity of Vacuum Aspiration Abortion, in Pregnancy Termination 146 (1979) ..... App. 3

Cates, Jr., Schulz, Gold & Tyler, Jr., Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation, in Pregnancy Termination 206 (1979) ..... 17-18, 25-26

Cates, Jr., Schulz & Grimes, Dilatation and Evacuation for Induced Abortion in Developing Countries: Advantages and Disadvantages, 11 Stud. Fam. Plan. 128 (1980) ..... 26

Centers for Disease Control, Annual Summary 1978 (1980) ..... 24-25

Chicago Sun-Times, The Abortion Profiteers 1978 (special reprint) ..... 21-22

Gangai, An unusual surgical injury to the ureter, 109 J. Urology 32 (1973) ..... App. 2

Gordon, Cervicovaginal fistula as a result of saline abortion, 112 Am. J. Obstet. Gynecol. 578 (1972) ..... App. 3

Grimes & Cates, Jr., abortion: methods and complications in Human Reproduction, 796 (1980) ..... App. 1, 3

Grimes & Cates, Jr., Fatal uterine rupture during oxytocin-augmented saline abortion, 130 Am. J. Obstet. Gynecol. 591 (1978) ..... App. 3

Lowensohn & Hibbard, Laceration of the ascending branch of the uterine artery: A complication of therapeutic abortion, 118 Am. J. Obstet. Gynecol. 36 (1974) ..... 17

PAGE

McDonald & Aaro, Medical Complications of Induced Abortion, 67 S. Med. J. 560 (1974) ..... App. 1

Merck Manual (13th ed. 1977) ..... 18, App. 5

National Center for Health Statistics, Hospital Discharge Survey Data, 1970-1976 (1972-1978) ..... App. 4

Peterson, Dilatation and Evacuation: Patient Evaluation and Surgical Techniques, in Pregnancy Termination 188 (1979) ..... App. 3

Rous, Major & Bordon, Rupture of the bladder secondary to uterine vacuum curettage: A case report and review of the literature, 106 J. Urology 685 (1971) ..... App. 2

Rubin, Cates, Jr., Gold, Rochat & Tyler, Jr., Fatal Ectopic Pregnancy After Attempted Legal Induced Abortion, 244 J.A.M.A. 1705 (1980) ..... App. 4

Second Trimester Abortion: A Symposium by Correspondence, 16 J. Reprod. Med. 47 (1976) ..... 25

Walton, Immediate Morbidity on Large Abortion Service, 72 N.Y. St. J. Med. 919 (1972) ..... App. 3

Watson, Urologic Complications of Legal Abortion, in New Perspectives on Human Abortion 135 (1981) App. 1

# In the Supreme Court of the United States

OCTOBER TERM, 1982

## No. 81-1623

**JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,**

*Petitioners,*

v.

**PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,**

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICUS

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:


OFFICERS

Chairman
DENNIS J. HORAN, ESQ.

Vice Chairmen
ERMA CLARDY CRAVEN
PROF. VICTOR G. ROSENBLUM

Secretary-Treasurer
JOSEPH R. STANTON, M.D.

Executive Director
STEVEN R. VALENTINE

BOARD OF DIRECTORS

JOHN E. ARCHIBOLD, ESQ.
Denver, Colorado

REV. CHARLES CARROLL
Episcopal Diocese of Colorado

ERMA CLARDY CRAVEN
Minneapolis, Minnesota

PROF. EUGENE F. DIAMOND, M.D.
Pediatrics
Loyola University, Chicago

PROF. ARTHUR J. DYCK
Population Ethics
Harvard University

JOHN F. HILLABRAND, M.D.
Toledo, Ohio

DENNIS J. HORAN, ESQ.
Chicago, Illinois

HENRY J. HYDE, ESQ.
Member of Congress

MILDRED F. JEFFERSON, M.D.
Boston, Massachusetts

LORE MAIER
Toledo, Ohio

KENNETH M. MITZNER, PH.D.
Los Angeles, California

PROF. JOHN T. NOONAN
Law
University of California

DR. JACOB A. O. PREUS,
Former President
The Lutheran Church
Missouri Synod

PROF. PAUL RAMSEY
Department of Religion
Princeton University

HERBERT RATNER, M.D.
Child & Family Quarterly
Oak Park, Illinois

PROF. VICTOR G. ROSENBLUM
Law-Political Science
Northwestern University

JOSEPH R. STANTON, M.D.
Boston, Massachusetts

PROF. GEORGE H. WILLIAMS
Divinity - Church History
Harvard University

JASPER F. WILLIAMS, SR., M.D.
Obstetrics - Gynecology

---

PROF. WILL HERBERG
Philosophy and Culture
Drew University
1971 - 1977

PROF. DAVID W. LOUISELL
Law
University of California
1975 - 1977

This case, like others presently to be considered by this Court, involves consideration of several broad areas of abortion regulation, including the health regulation of first trimester abortions (specifically through the requirement of pathology reports), the health regulation of post-first trimester abortions (specifically through the hospitalization requirement), and the protection of live-born children in post-viability abortions (specifically through the requirement that a second physician attend the procedure). This Court's decision will have a profound effect nationally on the validity of abortion regulations, and thus is of central importance to the class of unborn children, as well as the class of children aborted alive, all of whose interests AUL seeks to promote.

## SUMMARY OF ARGUMENT

The woman's fundamental right to decide to terminate her pregnancy does not require strict scrutiny of all legislation that has any effect on abortion. Strict scrutiny applies only to regulations which substantially burden the woman in the exercise of her right. *Harris* v. *McRae,* 448 U.S. 297, 314 (1980).

Nor does the special treatment of abortion procedures require strict equal protection analysis. *Id.* at 422. Only regulations which prohibit or virtually prohibit abortions or which provide a third party with a blanket veto trigger strict scrutiny by impinging on the right to abortion.

A requirement that a second physician attend the abortion of a viable child is primarily a child care regulation, and only affects abortion indirectly by slightly raising the cost. Thus, the burden on the right is insubstantial, and the regulation must only survive the rational basis test.

Children aborted alive are full persons under the law. Thus, a second doctor provision furthers the ultimate state interest—protection of the lives of its citizens—and sur-

vives rational scrutiny. Further, this vital state interest would justify the provision under strict scrutiny analysis. Since any post-viability abortion can result in a live birth —even a D & E, which might be abandoned in the event of an unanticipated maternal complication, thus allowing the possibility of infant survival—it is only proper that the state provide adequate safeguards for its citizens aborted alive.

The insignificant increased abortion cost resulting from the pathology report requirement does not impinge on the woman's right. Pathology reports are an efficient means of reducing maternal mortality. Such a requirement would thus further a legitimate state interest and survive rational scrutiny.

Even under strict scrutiny, the pathology report requirement is constitutional. The state has a compelling interest in providing basic care conditions ensuring maximum safety for the woman having an abortion at any stage of pregnancy. *Connecticut* v. *Menillo,* 423 U.S. 9, 10-11 (1975). Pathology reports directly reduce maternal mortality at only a minor increased cost and thus serve the state's compelling interest in maternal health. *Roe* v. *Wade,* 410 U.S. at 163. Furthermore, the requirement is especially necessary in order to combat abusive practices in abortion clinics. Pathology reporting essentially safeguards the woman in the exercise of her right, and hence survives strict scrutiny.

The post-first trimester hospitalization requirement neither prohibits abortion nor provides for a third-party veto. Strict scrutiny is, therefore, inappropriate. By providing an environment especially conducive to maternal safety, the hospitalization requirement furthers the state interest in maternal health and survives rational scrutiny.

Should this Court apply strict scrutiny, the hospitalization requirement remains constitutional. Complication rates for abortion increase dramatically after the first trimester. Hospitals possess such vital facilities as blood banks and intensive care units available on a 24-hour basis. This allows for maximum treatment capacities, and a hospitalization requirement thus directly furthers the staate's compelling interest in maternal life and health.

The abortion regulations at issue before this Court are well within constitution limits, and represent the state's pursuit of legitimate, indeed compelling interests. They must be upheld.

## ARGUMENT

### I.

### STRICT SCRUTINY IS NOT THE APPROPRIATE STANDARD OF REVIEW FOR THE CHALLENGED PROVISIONS.

Respondents challenge Missouri's statutory post-abortion pathology report requirement, its post-first trimester abortion hospitalization requirement, and its requirement that a second physician be present for post-viability abortions. Review begins with the threshold question of whether the regulations at issue impinge upon any fundamental right. *Maher* v. *Roe*, 432 U.S. 464, 470 (1977). If they do, strict scrutiny is appropriate. *Id.* If not, the regulations face "the less demanding test of rationality." *Id.* at 478.

#### A. Strict Scrutiny Is Only Appropriate When Legislation Substantially Burdens the Woman's Freedom to Decide.

Whether abortion regulations impinge upon a woman's right to choose—i.e., whether they trigger strict scrutiny—depends upon whether such regulations "substantially limit access to the means of effectuating that decision." *Carey* v. *Population Services International*, 431 U.S. 678, 688 (1977). Such substantial burdens* on the abortion

* By "substantial burden" is meant a state-imposed restriction on the exercise of a right which is sufficiently burdensome so as to constitute an impingement, thus triggering strict scrutiny. To withstand strict scrutiny, the restriction must be justified by a sufficiently compelling interest. Otherwise, the restriction constitutes an "undue burden" and is unconsitutional. An "insubstantial burden" is a restriction with an impact that is insufficient to trigger strict scrutiny.

right appear only in certain limited contexts, viz., total prohibitions, *see Roe* v. *Wade*, 410 U.S. 113 (1973), regulations "almost tantamount to a prohibition," *see Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 92, 102 (1976) (concurring opinions of Stewart, J., and Stevens, J.), and absolute third-party vetoes, *see, e.g., Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*).

Strict scrutiny is not required merely because some individuals will be "discouraged" from exercising a specific choice. *See Whalen* v. *Roe*, 429 U.S. 589, 602-603 (1977). In such a case, there is no absolute or near absolute prohibition. Nor is there a blanket third-party veto. Therefore, it cannot "be said that any individual has been deprived of the right to decide independently." *Id.* at 603.

Similarly, a substantial burden on the abortion decision is not created by a statutory requirement merely because it might increase the cost of an abortion. In *Danforth*, this Court held that recordkeeping and reporting requirements, which certainly add to the cost of an abortion, did not have a "legally significant impact or consequence on the abortion decision," 428 U.S. at 81, and thus did not trigger strict scrutiny. *See also Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (requirement that a licensed physician perform the abortion). These cases make it clear that strict scrutiny should be "invoked only when the state regulation *entirely frustrates or heavily burdens* the exercise of constitutional rights in this area." *Carey* v. *Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

**B. Strict Scrutiny May Not Be Invoked Merely Because Abortion Is Treated Differently Than Other Medical Procedures.**

The mere differential treatment of abortion from other medical procedures does not trigger strict scrutiny. Equal protection analysis applies strict scrutiny to the disparate treatment of a suspect class of *individuals* based on their *status*. But abortion implicates no suspect class. *See Maher* v. *Roe*, 432 U.S. at 470. Moreover, differential treatment of *procedures* cannot be equated with differential treatment of *individuals*. Hence, strict scrutiny cannot be invoked under equal protection principles when abortion is treated differently than other medical procedures.

Even so, in the context of its analysis of the post-abortion pathological report requirement, the court of appeals apparently invoked strict scrutiny merely because abortion had been singled out and treated differently than other medical procedures:

> "*Where the state regulates abortions beyond its regulation of similar surgical procedures, that difference in treatment must be shown to be necessitated by the particular characteristics of the abortion procedure.* *See Word* v. *Poelker*, [495 F.2d 1349, (8th Cir. 1974)]." *Hodgson* v. *Lawson*, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (emphasis added, footnote omitted).
>
> . . .
>
> [T]he question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment.

*Planned Parenthood Association of Kansas City, Missouri* v. *Ashcroft*, 655 F.2d 848, 870 (8th Cir. 1981).

This Court has repeatedly rejected such an analysis. In *Planned Parenthood of Central Missouri* v. *Danforth*, the plaintiffs argued "that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures." 428 U.S. 52, 80-81 (1976). This Court rejected that argument and sustained the requirements. *Id.* The Court reaffirmed this holding in the context of consent provisions, *Bellotti* v. *Baird*, 428 U.S. 132, 148-150 (1976), and Medicaid funding, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977). More recently, this Court has stressed that "the unique nature and consequences of the abortion decision" fully justifies special treatment. *Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*). In a still more recent case, this Court dispensed of the equal protection analysis suggested by the court of appeals in the instant case:

> The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan* v. *Maryland*, 366 U.S. [420, 425 (1961)].

*Harris* v. *McRae*, 448 U.S. 297, 422 (1980) (footnote omitted).

Thus, unless the Missouri regulations at issue here substantially burden the right to choose abortion, they cannot be subjected to strict scrutiny, regardless of whether they treat abortion differently than other medical procedures.

All that the state need demonstrate is that these abortion regulations are not "wholly irrelevant" to the achievement of some valid state interest in order to sustain them against an equal protection attack. Abortion regulations cannot be stricken merely because similar regulations have not been enacted with regard to other medical procedures. As this Court has held, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 [(1911)]. It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 486-487 (1970).

### C. The Regulations at Issue Do Not Substantially Burden the Woman's Freedom to Decide; They Rationally Relate to Legitimate State Interests.

#### 1. Requirement of Second Physician.

The court of appeals applied the strict scrutiny test to Missouri's requirement that a second physician attend all post-viability abortions. Noting that this requirement would increase the expense of an abortion, the court of appeals held that "a government-imposed regulation that adds to the cost of abortion is a government-created obstacle and is subject to strict scrutiny." *Planned Parenthood* v. *Ashcroft*, 655 F.2d 848, 864 (8th Cir. 1981).

This broad holding not only conflicts with *Danforth* and *Menillo*, but also with the court of appeals' own holding that strict scrutiny is inappropriate in considering record-keeping requirements even though they raise the price of an abortion. *Id.* at 871. The second physician requirement does not prohibit abortions, as did the regulation before this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973). Nor does

the provision provide for a blanket veto, as in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (*Bellotti II*). Thus a proper analysis of the second physician requirement would address the question of whether the increase in cost is so great as to be "drastically limiting [of] the availability and safety of the desired service." *Maher* v. *Roe*, 432 U.S. 464, 472 (1977).

Post-viability abortions, with their high attendant risks, will almost certainly be performed in a hospital. Given the easy availability of pediatricians in a hospital setting, it is unlikely that the requirement that a second physician attend the abortion procedure will so increase the relative cost of the abortion as to preclude women from choosing to have an abortion. Hence, the regulation does not significantly limit a woman's access to abortion, and cannot be said to place a substantial burden on the woman's right to choose.

Indeed, the second doctor requirement cannot properly be said to implicate the right to abortion at all. It is intended to provide assistance to infants born alive *after* termination of pregnancy, and thus relates to abortion in, at most, a very indirect fashion. The second physician requirement is an *infant care regulation*, not an abortion regulation.

Surely, this Court would not hold that a state requirement that a physician (as opposed to a mid-wife) must attend childbirth in order to assure proper medical attention to newborns "burdens" the right to childbearing. It would not hold that a state requirement that every newborn child must be examined by a physician or that certain drugs or vaccinations must be provided to the child "burdens" the right to childbearing. Neither should it hold

that a state requirement that a second physician be available during a post-viability abortion to assist a surviving child "burdens" the right to choose abortion.

"The remaining question then is whether the [second physician provision] is rationally related to a legitimate governmental objective." *Harris* v. *McRae,* 448 U.S. 297, 324 (1980). Certainly, the state maintains a most compelling interest in the life and health of any infant person born alive as the result of an attempted abortion. The presence of a second physician with the specific duty to care for a child surviving a post-viability abortion significantly furthers this interest since it may be presumed that the physician who attempts to kill the fetus before birth would not actively seek to assist a surviving infant.*

**2. Pathology Reports.**

The court of appeals held that the requirement of pathology reports for all abortions, like the second physician requirement, increased the cost of an abortion. 655 F.2d at 869. As already noted, strict scrutiny does not apply simply because a regulation raises the cost of an abortion. *See Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976); *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). In *Danforth,* this Court disclaimed the need for strict scrutiny and upheld cost-increasing recordkeeping requirements because they, like the pathology reports at issue here, "can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Id.* at 81 (footnote omitted).

---

* The record clearly indicates the need for a second physician to provide proper care for a child aborted alive. *See* testimony of Dr. Crist. Tr. 431, 435 (woman has a right to a dead fetus; never attempts to save fetus).

Since a minor cost increase is the only effect of this provision on the woman's decision, strict scrutiny should not be applied.

When examined under the rational basis test, the pathology report requirement is clearly constitutional. The state has an "important and legitimate interest in the health of the mother." *Roe* v. *Wade*, 410 U.S. 113, 163 (1973). "[P]athology reports are useful and even necessary in some cases," and "may warn of serious, possibly fatal disorders." *Planned Parenthood* v. *Ashcroft*, 655 F.2d at 870.

As illustrated in the Appendix, pathology reports are crucial in the detection of life-threatening conditions. Without regular pathology reporting, the incidence of maternal deaths from abortion will increase. Complications that pathology reports can detect include uterine perforation, rupture of maternal organs, incomplete abortions, infection and excessive bleeding. Each can lead to maternal death. The report can also warn of such urgent and potentially lethal conditions as ectopic pregnancy, hydatidaform mole (degenerate pregnancy), and choriocarcinoma (a highly malignant cancer). *See* Appendix.

Maternal mortality is a concern central to the right recognized in *Roe*, 410 U.S. at 163 (strength of state interest proportional to mortality rate for abortion and childbirth). Pathology reports, which directly and efficiently reduce the number of abortion deaths, serve the legitimate and compelling state interest in maternal life and health.

### 3. Hospitalization Requirement.

Similar considerations support the constitutionality of the post-first trimester hospitalization requirement. Like the pathology report requirement, this provision aims to enhance maternal health and reduce maternal deaths. It

does not prohibit abortions. It does not provide for an absolute third-party veto, nor does it so increase the cost of an abortion that it would drastically limit access to abortion. Therefore, it cannot be said to substantially burden the woman's decision to have an abortion. Hence, the hospitalization requirement is not subject to strict scrutiny.*

Under the rational basis test, the hospitalization requirement is clearly constitutional. The state has a legitimate—indeed compelling—interest in maternal health after the first trimester. *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Hospitals, with their superior treatment facilities —including intensive care units, blood banks, and various other equipment (all available 24 hours a day), as well as sizable staffs, including a wide variety of experts and specialists—provide an environment which is especially conducive to the protection of maternal health. Therefore, the post-first trimester hospitalization requirement is rationally related to the legitimate and compelling state interest in maternal health and is constitutional.

## II.

## EVEN UNDER STRICT SCRUTINY ANALYSIS, THE PROVISIONS ARE CONSTITUTIONAL.

Even were this Court to apply strict scrutiny and require a "compelling state interest," these provisions should be upheld. In its general form, the "compelling

---

* *Roe* indicated that a hospitalization requirements might be acceptable after the first trimester. 410 U.S. at 163. This implies that such a requirement could reasonably relate to the state's compelling interest in maternal health. This does not necessarily imply that a hospitalization requirement must always be subjected to strict scrutiny.

interest" standard states that the "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *See Roe* v. *Wade*, 410 U.S. 113, 155 (1973), and cases there cited.

The specific context of abortion rights produces a specific interpretation of the "narrowly drawn" requirement. With respect to the state's interest in potential human life, the statute is "narrowly drawn" even if the state goes so far as to proscribe all abortions except those performed to preserve the life or health of the mother. *Id.* at 163-164. With respect to the state's interest in maternal health, a regulation is narrowly drawn if it "*reasonably relates* to the preservation and protection of maternal health." *Id.* at 163 (emphasis added).

## A. The State's Compelling Interest in the Life of Infant Persons Justifies the Second Physician Requirement.

### 1. The State Has a Compelling Interest in Actual Human Life.

The state possesses a "legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Throughout pregnancy, abortion "is inherently different" from other medical procedures "because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). After viability the state's interest becomes "compelling," and, because of the unique importance of this interest, the state "may go so far as to proscribe abortion . . . except when necessary to preserve the life or health of the mother." *Roe* v. *Wade*, 410 U.S. at 163-164.

But when an infant is born or aborted alive, the state's interest becomes complete. At birth, the child becomes a

citizen and a full person under the Constitution. The child receives the full protection of the civil and criminal laws of the states.

The child protected by the second physician requirement possesses *actual*, not just potential human life. The rights under the Constitution of infants who survive abortion are equal to those of their mothers. Certainly, any "right to abortion" in this context cannot be deemed superior to the right of children to continued life. It is even more certain that whatever indirect effect a state law to protect the life of such infants might have on an abortion practice is outweighed by the ultimate state interest in protecting the lives of its citizens.

### 2. The Second Physician Requirement Is Narrowly Drawn.

Even if this Court finds that the second physician requirement substantially burdens the right to abortion, this regulation withstands strict scrutiny. A requirement that a second physician attend the abortion procedure is a far less significant burden on the abortion right than the total prohibition of post-viability abortions (except to preserve life or health) permitted by this Court. Moreover, the health of the women is not impaired in the slightest, and may even be enhanced by the presence of a second doctor. If an emergency situation should arise, this second physician will be available to provide instant assistance in treating the woman. The presence of the second physician also frees the first physician to concentrate all his efforts on the woman—efforts that might otherwise be divided were a live birth to ensue. Finally, were the women to enter a near-hopeless condition, the first doctor need not face the agonizing dilemma of choosing between devoting his

energies to preserving the mother's life, despite a poor prognosis, and working to save the child so that at least one of the two would survive.

The court of appeals held this provision to an unnecessarily high standard of precision by holding that it is overbroad for failing to account for circumstances where it is improbable that any child will survive an abortion. 655 F.2d at 865. *Roe* clearly indicates that in the context of post-viability abortions, the "narrowly drawn" requirement is satisfied if a "life or health" exception to an otherwise absolute prohibition is included. 410 U.S. at 163-164. Under the proper standard of review, which respects the vital state interest in the actual life of infant persons, the second doctor requirement is clearly constitutional.

### 3. The Requirement of a Second Physician Is Not Overbroad: An Abandoned D & E Procedure Might Produce a Live Birth.

Even under a stricter version of the "narrowly drawn" requirement, the second physician requirement is constitutional. The Eighth Circuit held the second physician provision to be impermissibly overbroad. 655 F.2d at 865. The court reasoned that since some doctors would employ the dilatation and evacuation (D & E) technique after the point of viability, and since a D & E is "always" fatal to a viable unborn child, the state had "no possible justification for a second physician during a D & E procedure." *Id.* at 865.

This reasoning is faulty because it is based on the unarticulated, false assumption that a D & E procedure, when attempted, *always* continues at least to the point of fetal destruction. Uncontradicted expert testimony indicated that "when a D & E *is performed* on a viable fetus there is

no chance of survival." *Id.* at 865 (emphasis added). Challengers of the statute did not assert, however, because they could not assert truthfully, that whenever a D & E is attempted, it is completed without complications that might require abandonment of the D & E procedure *before* the death of the fetus. Such complications allow for the possibility of infant survival and justify the attendance of a second physician.

This situation would arise, for example, when cervical dilatation (a procedure preliminary to extraction of the child from the womb) results in laceration of the ascending branch of either uterine artery. Lowensohn & Hibbard, *Laceration of the ascending branch of the uterine artery: A complication of therapeutic abortion,* 118 Am. J. Obstet. Gynecol. 36 (1974). This is a major complication often necessitating hysterectomy (removal of the uterus). A study of this complication noted that laceration and subsequent bleeding can preclude the anticipated abortion procedure and lead instead to a hysterectomy. *Id.* at 37-38. Were such a complication to arise in a post-viability D & E, the result would be effectively a Caesarian section delivery of a live child. The authors noted that such a "catastrophic injury is always possible, even in the hands of skilled and experienced surgeons." *Id.* at 36. Another study, noting the laceration complication, reported an incidence of cervical injury "ranging as high as 7.1/100 abortions." Cates, Jr., Schulz, Gold & Tyler, Jr., *Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation,* in Pregnancy Termination 206, 211 (1979). Thus, the possibility of such a situation arising is very real.

Other instances in which a D & E procedure might be abandoned before destruction of the child include those cases in which the mother dies or enters a life-threatening

condition subsequent to initiation of the procedure. Disseminated intravascular coagulation (DIC) "is one of the most serious of the acquired coagulation disorders," Merck Manual 319 (13th ed. 1977), and is a "rare, though serious, complication associated with D & E." Cates, Jr., Schulz, Gold & Tyler, Jr., *supra*, at 211. Moreover, a greater likelihood of DIC syndrome may be associated with both increased gestational age and the particular abortion method, such as D & E. *Id.* at 213. Hence, post-viability D & E should have a significantly higher incidence of this complication. Onset of DIC requires immediate treatment of the mother and, hence, cessation of the D & E procedure. Since the syndrome may result from the introduction of amniotic fluid into the woman's bloodstream via a uterine perforation, hysterectomy (and live birth) may follow. If the woman dies, an emergency Caesarian section offers a chance for infant survival. Similarly, if the woman dies from hypovolemic shock (severe loss of blood), toxic reaction to anesthesia, or other lethal complication following initiation of the D & E procedure, the D & E will be abandoned, again allowing the possibility of infant survival. Since the "risk of death from D & E increases as the gestational age increases," *id.* at 215, these occurrences would be especially likely during a post-viability D & E.

In light of these very real medical possibilities in which an attempted D & E could lead to a live birth, it becomes clear that the Missouri statute is not overbroad. The possibility of an *abandoned* D & E procedure and consequent live birth provides sufficient justification for the requirement of a second doctor, just as the possibility of live birth provides ample justification for the second physician requirement for other post-viability abortions. Since the state cannot know in advance which post-viability abor-

tions will produce a live birth, a requirement that a second physician attend every such abortion is narrowly drawn to suit the compelling state interest in the lives of infants who survive abortion.

### B. The State's Compelling Interest in Maternal Health Justifies the Pathology Report and Hospitalization Requirements.

The state also has "an important and legitimate interest in preserving and protecting the health of the pregnant woman," *Roe* v. *Wade*, 410 U.S. at 162. This interest arguably "lies at the core of the personal constitutional freedom recognized in *Wade*." *Harris* v. *McRae*, 448 U.S. 297, 315 (1980). *See also Connecticut* v. *Menillo*, 423 U.S. 9 (1975). The state's interest in maternal health becomes compelling at the end of the first trimester of pregnancy, *Roe* v. *Wade*, 410 U.S. at 163, and even justifies health regulations in the first trimester, *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (requirement of licensed physician); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 79-81 (1976) (recordkeeping requirements). Given the centrality of the maternal health concern, it follows that the state "may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health." *Roe* v. *Wade*, 410 U.S. at 163 (emphasis added).

This principle, which the Court employed to justify post-first trimester hospitalization requirements in *Roe*, applies equally to the pathological reporting requirement at issue here. That it applies in the first trimester of pregnancy is irrelevant. The state ordinarily has a compelling interest in maternal health after the first trimester. *Roe* v. *Wade*, 410 U.S. at 163. This state interest becomes compelling even during the first trimester if the regulation helps to maximize maternal health:

> *Roe* [v. *Wade*, 410 U.S. 113 (1973)] teaches that a State cannot restrict a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester because neither its interest in maternal health nor its interest in the potential life of the fetus is sufficiently great at that stage. But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion being as safe for the women as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman. *See* 410 U.S. at 149-150, 163.

*Connecticut* v. *Menillo*, 423 U.S. at 10-11.

Thus, any regulation which provides for basic "conditions insuring maximum safety for the woman" finds support in a compelling state interest, and this analysis proceeds in identical fashion, whether the regulation applies only after the first trimester or throughout pregnancy.* In both instances, the regulation will be upheld if it contributes to maternal safety and overturned if it "comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting" the abortion right—i.e., if the legislation is not "narrowly drawn." *Planned Parenthood* v. *Danforth*, 428 U.S. at 79; *see also Doe* v. *Bolton*, 410 U.S. 179, 194 (1973).

**1. Pathology Reports.**

Were this Court to strictly scrutinize the pathology report requirement, the statute would find sufficient justification in the state's interest in maternal health. Regular pathology reports constitute "conditions insuring maxi-

---

* Of course, not every health regulation falls into this category. Only those regulations that would provide for essential care which serve to decrease the *mortality* rate of abortion procedures find justification in a compelling state interest in all three trimesters.

mum safety for the woman", as illustrated in the Appendix. Pathology reports can identify, for example, such serious and possibly fatal complications as uterine perforation (puncture of the womb), and can warn of otherwise undiagnosed and subsequently lethal conditions such as ectopic (tubal) pregnancy. *See* Appendix. Thus, this safety measure forms a part of the predicate without which the state's interest is no longer insufficient. *Connecticut* v. *Menillo*, 423 U.S. at 10-11.

In *Roe* v. *Wade*, this Court held that a woman might be hospitalized after the first trimester of pregnancy because of the excess maternal mortality arising from abortion after that time. 410 U.S. at 163. Similarly, the state might properly require pathology reporting because of the excess maternal mortality that would occur absent such reports.

Moreover, a pathology reporting requirement is especially desirable for abortions, simply because of the special problems that accompany this procedure. Abortion has been a medical procedure associated with an unusually high incidence of abusive practices. *See, e.g., The Abortion Profiteers*, Chicago Sun-Times, 1978 (special reprint). The Sun-Times series revealed widespread shoddy practices, including failure to obtain proper pathology reports. One clinic neglected to preserve tissue samples for analysis. *Id.* at 25, col. 4. Other clinics sought pathology reports, but handled the specimens "so carelesly that the reports it gets back may be meaningless." *Id.* at 26, col. 2. In an article exposing 12 maternal deaths following Chicago clinic abortions between 1973 and 1978, the Sun-Times consulted abortion experts:

> "A microscopic exam is essential," said Dr. Paul Szanto, Chicago's dean of pathology and director of Cook County Hospital's pathology division. "Even

with a microscope, it happens over and over again that we cannot see [the true signs of pregnancy]."

Dr. Willard Cates Jr., who oversees abortion surveillance for the National Center for Disease Control in Atlanta, believes pathological reports are so important that no clinic should allow a patient to leave the premises without one.

"You can't let a woman walk out of an abortion clinic without an immediate review of the specimen," Cates said.

Without that lab analysis, he said, "You can't be certain that the woman was pregnant, or that you got all the fetal remains, or whether she had an ectopic pregnancy."

*Id.* at 26, col. 3.

This Court has referred to improper abortion practices on several occasions. *See, e.g., Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); *Bellotti* v. *Baird*, 443 U.S. 622, 641 n.21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics). These problems reinforce the need for legislative control over clinic practices, and supplement the medical grounds for pathology reports (*see* Appendix) already acknowledged by the court of appeals. 655 F.2d at 670. Clearly, this health measure directly furthers and is reasonably related to the state's compelling interest in the pregnant woman's life and health, and it thus survives strict scrutiny.

### 2. Hospitalization Requirement

*Roe* specified that a hospitalization requirement would be a permissible state regulation of post-first trimester abortions. 410 U.S. at 163. The court of appeals nonetheless overturned this requirement merely because one of the several procedures used for second and third

trimester abortions, dilatation and evacuation (D & E), was not found to be widely available within hospitals and was not found to be "safer" when performed in a hospital than when performed outside a hospital. 664 F.2d at 687, 689. But this holding is tantamount to requiring that a statute must be "perfectly drawn" in order to "reasonably relate" to maternal health. Such a standard would permit no regulation of abortions at all, except on a case-by-case basis. Even a physician requirement would be unreasonable, since, for example, fourth-year medical students at a high caliber urban medical school might well be more competent to perform abortions than rural podiatrists would be.

Moreover, since the state cannot know in advance when complications will arise which require a hospital environment, the state can only weigh the competing interests of safety and convenience. If the resultant legislation so balances these interests as to be reasonably related to maternal health, then the legislation withstands strict scrutiny.

The Constitution does not require that abortion health regulations correspond perfectly to state interests in every instance. Rather, the legislative enactment must be evaluated as a whole, to see if it will "serve" or "enhance" the state interest offered as a justification. *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 75 (1976). Regulations that serve the state's interest in maternal health need only be "reasonably related" to that interest to survive constitutional attack. *Roe* v. *Wade,* 410 U.S. at 163. Hence, the lower court in this case should have compared *generally* the safety of hospitalized abortion after the first trimester with non-hospitalized second and third trimester abortion, rather than singling out D & E abortion for special treatment. Such a comparison, if

carefully conducted to control for biases,* would have provided a proper basis for determining whether the post-first trimester hospitalization requirement is reasonably related to maternal health.

The Court of Appeals for the Eighth Circuit also based its holding that the post-first trimester hospitalization requirement was unconstitutional on a finding by the district court that "second trimester D & E procedures performed at out-patient facilities are just as safe as those procedures performed in hospitals." No. 79-4142-CV-C-H, slip op. at 14 (W.D. Mo. Oct. 2, 1981). From this factual determination the court of appeals concluded that "section 188.025 is not reasonably related to maternal health and, therefore, . . . is unconstitutional." 664 F.2d at 690.

The court's conclusion, however, rests upon an incomplete understanding of the hospitalization requirement. This requirement seeks not only to reduce the risks of second trimester abortions, but also to facilitate the treatment of complications *when they arise.* Even if the *risks* of complications occurring during a second trimester D & E are identical for procedures performed within hospital or non-hospital facilities, the statutory requirement is nonetheless reasonably related to maternal health because hospitals possess superior facilities for *treatment* when complications do arise.

According to the Centers for Disease Control, Annual Summary 1978 (1980), roughly 50% of all abortions per-

---

* For example, if a woman has a late term abortion, and hence one entailing higher risks, or if a woman has medical indications for attendant complications, she will more likely have her abortion in a hospital. Thus the unanalyzed data will tend to make hospitalized abortions appear to be more dangerous than non-hospitalized abortions. In fact, it is because hospitals are safer that the woman expecting difficulties will enter hospital facilities in the first place.

formed at 13 or more weeks of gestation employ methods other than D & E. *Id.* at 43, Table 14. Of these, hysterotomy and hysterectomy procedures, being major surgery, will necessarily take place in hospitals. Intraamniotic abortifacient instillation procedures constitute the remainder of the post-first trimester abortions. With regard to these one expert, Charles A. Ballard, M.D., commented as follows: "I feel it is necessary that all amnio-infusions be performed in a hospital with a staff present at all times and with an adequate laboratory facility available (e.g., a blood bank)." *Second Trimester Abortion: A Symposium by Correspondence,* 16 J. Reprod. Med. 47, 55-56 (1976). Dr. Ballard went so far as to urge that at least for saline abortion, "these procedures should be performed by competent physicians, under a strict antiseptic regimen, *only in certain designated hospitals* with staff available 24 hours and adequate laboratory facilities." *Id.* at 56 (emphasis added).

Dr. Ballard based his opinion on the existence of "the potential complications of infection, hemorrhage, consumptive coagulopathy, etc." *Id.* at 56. His study did not discuss the D & E procedure, but another report noted that the "most common complications associated with D & E are infection and hemorrhage," Cates, Jr., Schulz, Gold & Tyler, Jr., *Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation,* in Pregnancy Termination 206, 210 (1979), and that consumptive coalgulopathy is "a rare, though serious, complication associated with D & E." *Id.* at 211. Since the same complications which make hospitalization imperative for other post-first trimester procedures occur with D & E procedures, it follows that hospitalization is appropriate for D & E abortions as well.

Dr. Willard Cates reports that the misestimation of gestational age contributes to the complication rate for D & E, and that routine sonography might "aid in reducing complications and deaths from D & E." *Id.* at 215. In another study Cates explains that "if routine sonography is to be performed on every woman, an ultrasound scanner" is necessary; therefore, one should keep in mind that "many hospitals already have this equipment available for managing other obstetric and nonobstretric conditions." Cates, Jr., Schulz & Grimes, *Dilatation and Evacuation for Induced Abortion in Developing Countries: Advantages and Disadvantages,* 11 Stud. Fam. Plan. 128, 130 (1980). Dr. Cates continues:

> Because D & E is riskier than curettage at earlier gestations, it should be performed in settings with proper supervision and backup facilities. However, the currently available alternatives—instillation procedures and abdominal hysterotomy—should also be performed under similar circumstances.

*Id.* at 130.

Clearly a legislature might reasonably conclude that a hospitalization requirement for all abortion after the first trimester is a proper safety regulation. "Since all methods of terminating pregnancies after 12 weeks should be performed under equivalent circumstances," as Dr. Cates indicates, *id.* at 132, it is reasonable if not imperative that the state impose a hospitalization requirement.

The hospitalization requirement is certainly a regulation reasonably related to the state's compelling interest in maternal health. As such, it is narrowly drawn and should be upheld.

## III. CONCLUSION

The Missouri regulations at issue before this Court do not substantially burden a woman's right to decide to terminate her pregnancy. Moreover, these provisions are justified by compelling state interests in the heaith of the mother and the actual life of infant citizens.

Wherefore, your amicus prays this Court to reverse the Court of Appeals for the Eighth Circuit, and uphold these provisions.

Respectfully submitted,

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan, Suite 915
Chicago, IL 60601
312/263-5029
*Attorneys for*
*Americans United for Life*

Law Students Who Assisted in the Preparation of this Brief: Daniel Avila, Thomas J. Balch, Elizabeth Bower, Michael R. Carey, Richard Cohen, Walter M. Weber.

Medical Consultant for this Brief: Steven R. Zielinski, M.D.